

**DETENTION IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK**

SUZANNA BOWLING, individually and on
behalf of all others similarly situated,

Plaintiff,

v.

JOHNSON & JOHNSON and McNEIL
NUTRITIONALS, LLC,

Defendant.

Case No. 1:17-cv-03982-AJN

**DEFENDANTS JOHNSON & JOHNSON AND McNEIL NUTRITIONALS, LLC'S
MEMORANDUM OF LAW IN SUPPORT OF MOTION TO EXCLUDE THE
TESTIMONY OF PLAINTIFF'S EXPERT J. MICHAEL DENNIS**

Dated: September 20, 2018

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MEMORANDUM OF LAW

I. INTRODUCTION

A series of 20 horizontal black bars of varying lengths, arranged vertically. The bars are of uniform thickness and are set against a white background. The lengths of the bars decrease from top to bottom, creating a visual gradient. The first bar is the longest, and the last bar is the shortest. The bars are evenly spaced vertically.

A series of horizontal black bars of varying lengths, likely representing a redacted list of items. The bars are arranged vertically, with some being significantly longer than others, suggesting a list where some items are much more detailed or descriptive than others. The first few bars are very long, while the subsequent ones are progressively shorter, creating a visual hierarchy or a sense of a list that continues beyond the frame.

² Exhibit numbers refer to those attached to the concurrently filed Declaration of Jason A. Orr in Support of Defendants' Opposition to Plaintiff's Motion for Class Certification.

A series of 20 horizontal black bars of varying lengths, decreasing in size from top to bottom. The bars are evenly spaced and extend across the width of the frame.

A series of 15 horizontal black bars of varying lengths, representing data points. The bars are arranged vertically, with the longest bar at the top and the shortest at the bottom.

III. **LEGAL STANDARD**

As the proponent of expert testimony, Bowling bears the burden of establishing its admissibility. *See United States v. Williams*, 506 F.3d 151, 160 (2d Cir. 2007). Expert testimony is inadmissible unless it (i) is “based on sufficient facts or data” and is “the product of reliable principles and methods” that (ii) the expert has “reliably applied . . . to the facts of the case.”

Fed. R. Evid. 702(b)–(d); *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 589 (1993) (expert testimony must be “not only relevant, but reliable”). The Court must probe “whether [the expert’s] reasoning or methodology properly can be applied to the facts in issue.” *Daubert*, 509 U.S. at 592–93.

Expert testimony submitted in support of class certification is subject to “*Daubert*’s rigorous standards insofar as that testimony is relevant to the Rule 23 class certification analysis.” *Royal Park Invs. SA v. Wells Fargo Bank, N.A.*, 2018 U.S. Dist. LEXIS 9087, at *10 (S.D.N.Y. Jan. 10, 2018) (quoting *Scott v. Chipotle Mexican Grill, Inc.*, 315 F.R.D. 33, 55 (S.D.N.Y. 2016)); *see also generally Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993). Plaintiffs have an obligation under *Comcast* to establish that “damages are capable of measurement on a classwide basis.” *Comcast Corp. v. Behrend*, 569 U.S. 27, 34–38 (2013) (rejecting a damages model that failed to “translat[e] . . . the *legal theory of the harmful event* into an analysis of the economic impact of *that event*” (emphasis in original)). “In determining admissibility under *Daubert*, trial judges are charged with a gate-keeping function pursuant to Rule 702 whereby they must determine (1) whether the theory or methodology underlying the testimony is reliable and (2) whether the expert’s theory or methodology is relevant in that it ‘fits’ the facts of the case.” *Astra Aktiebolag v. Andrx Pharms., Inc.*, 222 F. Supp. 2d 423, 487 (S.D.N.Y. 2002) (citing *Daubert*, 509 U.S. at 590–91; *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 149–50 (1999); *Campbell v. Metro. Prop. & Cas. Ins. Co.*, 239 F.3d 179, 184–85 (2d Cir. 2001)). A damages methodology is “inadmissible under *Daubert*” if it “ha[s] no discernible (and, hence, reliable) relation to the facts or theories in [the] case.” *Gutierrez v. Wells Fargo & Co.*, 2010 WL 1233810, at *7–8 (N.D. Cal. Mar. 26, 2010). Moreover, “if the survey suffers from substantial methodological flaws, it will be excluded under both Rule 403 and Rule 702.” *Louis*

Vuitton Malletier v. Dooney & Bourke, Inc., 525 F. Supp. 2d 558, 581 (S.D.N.Y. 2007); *see also THOIP v. Walt Disney Co.*, 690 F. Supp. 2d 218, 236–40 (S.D.N.Y. 2010) (excluding survey that “failed to sufficiently replicate the manner in which consumers encountered the parties’ products in the marketplace, which severely diminishes the reliability and probative force” of the survey).

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

IV. ARGUMENT

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].

[REDACTED]

A damages methodology is inadmissible under *Daubert* where it has “no discernable . . . relation to the facts or theories in [the] case.” *Gutierrez*, 2010 WL 1233810, at *7–8. [REDACTED]

[REDACTED]

[REDACTED]

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See Gutierrez, 2010 WL 1233810, at *7–8; *cf. also Comcast*, 569 U.S. at 35 (“[A] model purporting to serve as evidence of damages in [a] class action must measure only those damages

attributable to that theory. If the model does not even attempt to do that, it cannot possibly establish that damages are susceptible of measurement across the entire class.”).

[REDACTED]
[REDACTED]. *See, e.g., Saavedra v. Eli Lilly & Co.*, 2014 WL 7338930, at *4 (C.D. Cal. Dec. 18, 2014). [REDACTED]

[REDACTED] “[t]he ultimate price of a product is a combination of market demand and market supply.” *In re NJOY, Inc. Consumer Class Action Litig.*, 120 F. Supp. 3d 1050, 1119 (C.D. Cal. 2015) (cannot take “subjective inquiry of what an average consumer wants” under conjoint analysis and translate it into “an objective evaluation of relative fair market values”) (internal citations omitted) [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
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A series of 15 horizontal black bars of varying lengths, decreasing from left to right. The bars are evenly spaced and extend from the left edge of the frame to different points on the right, creating a visual effect of decreasing magnitude or value.

[REDACTED] *In re NJOY*, 120 F. Supp. 3d at 1120. For that reason alone, Dennis's testimony should be excluded.

Visteon Global Techs., Inc. v. Garmin Int'l, Inc., 2016 WL 5956325, at *5–7, 19 (E.D. Mich. Oct. 14, 2016). Similarly, in *Saavedra v. Eli Lilly & Co.*, plaintiffs alleged that Eli Lilly misrepresented the safety of its antidepressants, and proposed a conjoint analysis to

measure consumers’ subjective valuation of the safety claim. 2014 WL 7338930, at *4. The court explained that it “found no case holding that a consumer may recover based on consumers’ willingness to pay irrespective of what would happen in a functioning market (*i.e.*, what could be called sellers’ willingness to sell).” *Id.* at *5. The court rejected the proposed conjoint model as “highly flawed,” finding that the model only looks at the demand side of the equation (consumer willingness to pay), without looking at the supply side to determine how the product was actually priced. *Id.* Similarly, in *Apple, Inc. v. Samsung Electronics Co.*, 2014 WL 976898, at *10–11 (N.D. Cal. Mar. 6, 2014), the court rejected a conjoint damages model, because it calculated consumers’ “willingness to pay” in a “vacuum,” without relation to actual prices. *Id.* at *11. There, the court found that the “survey did not account at all for competitor products or other supply,” even though the “serious market competition in the smartphone and tablet industry works to depress prices.” *Id.* Because the survey did not take into account “the real-world intersection of market demand and market supply,” it could not be used to calculate a price premium. *Id.* at *12. *See also In re NJOY*, 120 F. Supp. 3d at 1120.

[REDACTED]

. Gutierrez v. Wells Fargo & Co., 2010 WL 1233810, at *8 (N.D. Cal. Mar. 26, 2010) (damages methodology is “inadmissible under *Daubert*” if it “ha[s] no discernible (and, hence, reliable) relation to the facts or theories in [the] case.”).

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED].

[REDACTED] . *Gutierrez*, 2010 WL 1233810 at *8.

C. [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] *Leelanau Wine Cellars, Ltd. v. Black & Red, Inc.*, 452 F. Supp. 2d 772, 778 (W.D. Mich. 2006) (emphasis added).
[REDACTED]
[REDACTED] *Vista Food Exch., Inc. v. Vistar Corp.*, 2005 WL 2371958, at *7 (E.D.N.Y. Sept. 27, 2005) (excluding the plaintiff's likelihood of confusion survey as "flawed to the point that its probative value is substantially outweighed by [its] potential for unfair prejudice and confusion"); *Revlon Consumer Prods. Corp. v. Jennifer Leather Broadway, Inc.*, 858 F. Supp. 1268, 1276 (S.D.N.Y. 1994) (finding survey "so unreliable that it is entitled to no weight"), *aff'd* 57 F.3d 1062 (2d Cir. 1995); *Exxon Corp. v. XOIL Energy*

Res., Inc., 552 F. Supp. 1008, 1021 (S.D.N.Y. 1981) (affording survey no weight where survey not “taken under market conditions” and “not conducted on a properly selected and representative sample of the population”).

1.

Term	Percentage
GMOs	75
Organic	85
Natural	88
Artificial	65
Organic	82
Natural	85
Artificial	68
Organic	80
Natural	83
Artificial	62
Organic	78
Natural	81
Artificial	64
Organic	76
Natural	79
Artificial	66
Organic	74
Natural	77
Artificial	63
Organic	72
Natural	75
Artificial	61
Organic	70
Natural	73
Artificial	59
Organic	68
Natural	71
Artificial	57
Organic	66
Natural	69
Artificial	55
Organic	64
Natural	67
Artificial	53
Organic	62
Natural	65
Artificial	51
Organic	60
Natural	63
Artificial	49
Organic	58
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Artificial	47
Organic	56
Natural	59
Artificial	45
Organic	54
Natural	57
Artificial	43
Organic	52
Natural	55
Artificial	41
Organic	50
Natural	53
Artificial	39
Organic	48
Natural	51
Artificial	37
Organic	46
Natural	49
Artificial	35
Organic	44
Natural	47
Artificial	33
Organic	42
Natural	45
Artificial	31
Organic	40
Natural	43
Artificial	29
Organic	38
Natural	41
Artificial	27
Organic	36
Natural	39
Artificial	25
Organic	34
Natural	37
Artificial	23
Organic	32
Natural	35
Artificial	21
Organic	30
Natural	33
Artificial	19
Organic	28
Natural	31
Artificial	17
Organic	26
Natural	29
Artificial	15
Organic	24
Natural	27
Artificial	13
Organic	22
Natural	25
Artificial	11
Organic	20
Natural	23
Artificial	9
Organic	18
Natural	21
Artificial	7
Organic	16
Natural	19
Artificial	5
Organic	14
Natural	17
Artificial	3
Organic	12
Natural	15
Artificial	1
Organic	10
Natural	13
Artificial	0

[REDACTED] *E.g., Saavedra, 2014 WL 7338930, at *4 (infrequent discontinuation symptoms of prescription antidepressant); Apple, Inc., 2014 WL 976898, at *11 (touch screen hand gestures in smartphones and tablets); Visteon, 2016 WL 5956325, at *5–7, 19 (menu and display options on navigation device).*

[REDACTED] in *In re Scotts EZ Seed Litigation*, 304 F.R.D. 397 (S.D.N.Y. 2015), the feature tested in the conjoint was a claim on packages of grass seed that it would grow lawns “50% thicker with half the water.” *Id.* 412–15. [REDACTED]

See also *Kurtz v. Kimberly-Clark Corp.*, 321 F.R.D. 482, 551 (E.D.N.Y. 2017) (tested feature was flushability of “flushable” moistened wipes); *Khoday v. Symantec Corp.*, 2014 WL 1281600, at *11 (D. Minn. Mar. 13, 2014) (ability to use software download insurance to

redownload software).

A series of 15 horizontal black bars of varying lengths, decreasing in length from top to bottom. The bars are positioned against a white background.

Co. v. Occidental Chem. Corp., 608 F.3d 284, 294 (5th Cir. 2010); see also *Kumho*, 526 U.S. at 157 (a district court is not required to “admit opinion evidence that is connected to . . . [the case] only by the *ipse dixit* of the expert.”).

2. Dennis Surveyed the Wrong Universe of Consumers

“For a survey to be valid, the persons interviewed must adequately represent the opinions which are relevant to the litigation.” *In re Fluidmaster, Inc., Water Connector Components Prod. Liab. Litig.*, 2017 WL 1196990, at *29 (N.D. Ill. Mar. 31, 2017); *see also Jordache Enters. v. Levi Strauss & Co.*, 841 F. Supp. 506, 518 (S.D.N.Y. 1993) (citing *Universal City Studios, Inc. v. Nintendo Co.*, 746 F.2d 112, 118 (2d Cir. 1984) (“To be valid, a survey must rely on responses

by potential customers of the products in question.”). As the Federal Judicial Center’s Reference Manual on Scientific Evidence explains, “[i]dentification of the proper target population or universe is recognized uniformly as a key element in the development of a survey.” (*Reference Manual on Scientific Evidence* 376 n.76 (3d ed. 2011).) “The definition of the relevant population is crucial because there may be systematic differences in the responses of members of the population and nonmembers.” (*Id.* at 377).)

A series of 15 horizontal black bars of varying lengths, representing data points. The bars are evenly spaced and extend from the left edge of the frame to varying positions on the right, with the longest bar at the top and the shortest at the bottom.

[REDACTED]

[REDACTED]

[REDACTED]

Courts have repeatedly excluded expert testimony where the expert surveyed the wrong population. For example, in *Cumberland Packing Corp. v. Monsanto Co.*, the court excluded as “unreliable” a survey that used an overbroad population. 140 F. Supp. 2d 241, 245 (E.D.N.Y. 2001). The “relevant universe” in that case was “people with a current interest in purchasing an aspartame-based sugar substitute,” but the universe of survey respondents “was over-inclusive in that it contained ‘users or buyers of sugar substitutes within the past six months.’” *Id.* Similarly, in *1-800 Contacts, Inc. v. Lens.com, Inc.*, 2010 WL 5186393, at *6–7 (D. Utah Dec. 15, 2010), the court excluded a survey as unreliable that questioned “individuals who had purchased contacts within the prior twelve months or who intended to purchase contacts within the next twelve months,” where the relevant universe was “consumers who purchase contacts on the Internet.” *Id.* at *6 (emphasis in original). Since the survey was not limited to “those who purchased contacts on the Internet,” the court concluded that the “survey universe was improper.” *Id.* at *6–7.

[REDACTED]

A series of 20 horizontal black bars of varying lengths, decreasing in size from top to bottom. The bars are evenly spaced and extend across the width of the frame. The lengths of the bars decrease in a regular, linear fashion from the top bar to the bottom bar.

A page with 20 horizontal black redaction bars. The bars are evenly spaced and extend across most of the page width. The first bar is at the top, and the last bar is near the bottom. There are a few small white spaces between the bars, notably one in the middle and one near the bottom.

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[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

V. CONCLUSION

For the forgoing reasons, Defendants respectfully request that the Court exclude the opinions of Plaintiff's expert J. Michael Dennis.

Date: September 20, 2018
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Respectfully submitted,

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